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Some Aspects of the Requirement that the Personal Representative Sue for Wrongful Death

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SOME ASPECTS OF THE REQUIREMENT THAT THE PERSONAL REPRESENTATIVE SUE FOR WRONGFUL DEATH.—At common law, no civil action lay for causing the death of a human being, whether due to intentional or negligent acts. A husband could sue for injuries to his wife, but not for her death.¹ Because of the illogical consequences which followed from this harsh rule, Lord Campbell's Act was enacted in England in 1846,² which allowed an action for the death of a person, whenever the person himself could have sued for an injury, had he survived; the action was for the benefit of the spouse, parent, or child of the injured person, and the damages were measured by the pecuniary injury to the beneficiaries. This statute, in some form, has been copied in all of our states, there being much variation regarding the party to bring the suit.

The New York Legislature enacted such a statute in 1847.³ In 1880, the statutory provisions relating to actions for wrongfully or negligently causing death were transferred to the Code of Civil Procedure.⁴ This right of action was preserved by the New York Constitution in 1896.⁵ When the Code of Civil Procedure was superseded by the Civil Practice Act in 1920,⁶ the wrongful death statutes were shifted to their present position in the Decedent Estate Law.⁷

Because of the many ramifications involved in the New York wrongful death statutes,⁸ a comprehensive discussion of these statutes as a whole is prevented.⁹ Therefore, this discussion will be limited to a consideration of the requirement regarding the person who may bring the action in New York.¹⁰

¹ *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808). Lord Ellenborough held that in a civil court, the death of a human being could not be complained of as an injury, and the damages as to the plaintiff's wife must stop with the period of her existence.

² Lord Campbell's Act, 1846, 8 & 10 Vict., c. 93.

³ Laws of N. Y. 1847, c. 450.

⁴ N. Y. CODE CIV. PROC. §§ 1902-1905.

⁵ N. Y. CONST. Art. I, § 15 (1896)—now Art. I, § 16.

⁶ See PRASHKER, *NEW YORK PRACTICE* § 3 (1947).

⁷ N. Y. DEC. EST. LAW §§ 130-134. Section 130 was derived from the CODE CIV. PROC. § 1902 without change. Section 131 was taken from the CODE CIV. PROC. § 841-b, without change. Section 132 was taken from the CODE CIV. PROC. § 1904; amended L. 1935, c. 224; L. 1949, c. 638, § 2, eff. April 16, 1949. Section 133 was taken from the CODE CIV. PROC. § 1903; amended L. 1929, c. 229, § 7; L. 1934, c. 216, § 4; L. 1937, c. 566, § 5; L. 1940, c. 829, § 14; L. 1941, c. 89, § 2; L. 1949, c. 638, § 3, eff. April 16, 1949; L. 1949, c. 639, § 4, eff. April 16, 1949. Section 134 was taken from the CODE CIV. PROC. § 1905, without substantial change.

⁸ N. Y. DEC. EST. LAW §§ 130-134.

⁹ For a discussion with regard to the period of limitation and the New York wrongful death statutes, see Note, *Some Aspects of the Period of Limitation Governing the Action for Wrongful Death in New York*, 22 ST. JOHN'S L. REV. 221 (1948).

¹⁰ N. Y. DEC. EST. LAW § 130: "The executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover

The action must be brought by the personal representative of the decedent within two years after the decedent's death.¹¹ However, it is a condition precedent to the wrongful death action that the injured person must have had a right of action to recover for personal injuries at the time of his death.¹² Unlike an ordinary action to recover damages for personal injury, where the plaintiff must prove freedom from contributory negligence,¹³ the burden in an action for damages for wrongful death is on the defendant to prove that the decedent was contributorily negligent.¹⁴ The damages awarded in such an action are measured by the pecuniary injury, resulting from the decedent's death, to the person or persons for whose benefit the action is brought.¹⁵ The proceeds of a recovery in an action for wrongful death are held by the personal representative as a special fund subject to a trust for the sole benefit of the statutory distributees,¹⁶ and do not become part of the general estate of the decedent.¹⁷

It is to be noted that the action is maintainable *only* in the name of the personal representative,¹⁸ and if no such person exists, the

damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the husband, wife, or next of kin, do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit."

¹¹ *Ibid.*

¹² *Meyer v. Inguaggiato*, 258 App. Div. 331, 16 N. Y. S. 2d 672 (2d Dep't 1940); *Fontheim v. Third Ave. Ry.*, 257 App. Div. 147, 12 N. Y. S. 2d 90 (1st Dep't 1939). It should also be shown that the decedent left surviving a husband, wife, or next of kin. *Lucas v. N. Y. Cent. Ry.*, 21 Barb. 245 (N. Y. 1855).

¹³ *Radin v. State*, 192 Misc. 247, 80 N. Y. S. 2d 189 (Ct. Cl. 1948).

¹⁴ *Andross v. Trustees of Columbia University*, 287 N. Y. 160, 38 N. E. 2d 480 (1941). N. Y. DEC. EST. LAW § 131: "On the trial of an action to recover damages for causing death the contributory negligence of the person killed shall be a defense, to be pleaded and proven by the defendant."

¹⁵ *Sutherland v. State*, 189 Misc. 953, 68 N. Y. S. 2d 553 (Ct. Cl. 1947); see N. Y. DEC. EST. LAW § 132.

¹⁶ See N. Y. DEC. EST. LAW § 133 for a listing of the beneficiaries entitled to the proceeds.

¹⁷ *Central New York Coach Lines v. Syracuse Herald Co.*, 277 N. Y. 110, 114, 13 N. E. 2d 598, 599 (1938). This was an action brought by the administrator to recover for the death of his intestate which occurred when his automobile collided with a motor bus belonging to the defendant. The court held that a counterclaim for damages to the bus was improperly set up. No claim of the defendant against the general estate of the decedent could diminish or defeat a recovery by the administrator. See N. Y. DEC. EST. LAW § 133.

¹⁸ *Crouse v. New York State Rys.*, 214 App. Div. 678, 213 N. Y. Supp. 576 (4th Dep't 1925).

action may not be maintained.¹⁹ The two year period of limitation begins to run from the date of death and not from the date of the appointment of the legal representative.²⁰ From this it can be seen that unless a personal representative is appointed within two years after the death of the decedent and commences an action to recover the damages for wrongful death within the two year period, the action will be barred.²¹ The delay in the appointment of the personal representative does not toll the running of the statute applicable to actions for wrongful death.²²

It has been reiterated in New York that the damages are recoverable not for an injury to the estate of the decedent, but for an injury to the beneficiaries caused by his death. The executor or administrator of the decedent is a mere nominal party without any interest in the amount of the recovery, and he holds the amount

¹⁹ *Boffe v. Consolidated Telegraph and Electrical Subway Co.*, 171 App. Div. 392, 394, 157 N. Y. Supp. 318, 320 (1st Dep't 1916), *aff'd*, 226 N. Y. 654, 123 N. E. 856 (1919), where the court held that since an action to recover damages for wrongful death can only be brought by the personal representative of the decedent, an action brought before the appointment of a representative is premature and the defendant is entitled to a dismissal of the complaint, not on the merit. For the effect of such a dismissal, *see Mehrer v. North Ninth Lumber Co., Inc.*, 195 Misc. 566, 90 N. Y. S. 2d 285 (Sup. Ct. 1949), where an action for wrongful death brought within two years after the death of the husband was dismissed on the ground that the widow, as plaintiff, had not been appointed administratrix. A second action brought against the same defendants upon the same theory, more than four years after death, was not barred by the two-year statute of limitation. The court relied on N. Y. Civ. PRAC. ACT § 23, holding that the previous action was not dismissed on the merits, and since the widow as administratrix brought this action within one year after the dismissal of the complaint of the prior action Section 23 applied.

²⁰ *Cohen v. Steigman*, 249 App. Div. 819, 292 N. Y. Supp. 750 (2d Dep't 1937); *Leun v. Brimmer*, 203 App. Div. 643, 197 N. Y. Supp. 3 (2d Dep't 1922). Here decedent died March 3, 1919. Plaintiff was appointed administrator August 17, 1922. The court held the action barred. The action must be commenced within two years after the decedent's death, and not within two years after the granting of letters of administration.

²¹ *Ibid.*

²² *Mehrer v. North Ninth Lumber Co., Inc.*, 195 Misc. 566, 90 N. Y. S. 2d 286 (Sup. Ct. 1949). *Contra*: *Jones v. 416 Pleasant Ave. Holding Corporation*, — Misc. —, 90 N. Y. S. 2d 92 (Sup. Ct. 1949). In the *Jones* case decedent died January 30, 1946 and letters of administration were issued on July 9, 1948. The action was instituted on July 20, 1948. The court held that the wrongful death action was not barred because the action was commenced less than two years after the issuance of letters of administration. As authority for this proposition the court relied on *Crapo v. City of Syracuse*, 183 N. Y. 395, 76 N. E. 465 (1906). The *Crapo* case seems to be poor authority for this proposition. This case was one of several cases involving actions for wrongful death brought against municipalities. As a condition precedent to bringing any tort action against a municipality, the plaintiff must file a notice of claim within 90 days from the accrual of the cause of action. N. Y. GEN. MUNIC. LAW § 50-e. In these several cases the courts have declared that the cause of action for wrongful death accrues only upon the appointment of the personal representative of the decedent; but, these statements of the court were made with reference to the notice of claim time limitation

recovered in the capacity of a trustee or agent for the beneficiaries.²³ The right of action for wrongful death exists for the benefit of the next of kin but the right of action is vested in the personal representative.²⁴ Since the personal representative is merely a formal party, there is no cogent argument for insisting that he be the only party allowed to bring the action. The controlling purpose of the wrongful death statutes is to benefit the surviving spouse and next of kin, not the estate of the decedent or the personal representative.²⁵ Hence, it is more in consonance with the express purpose of the statute that the statutory beneficiaries should be allowed to maintain an action in their own right. It is not a problem for the courts to decide for the present section²⁶ is quite explicit and leaves no room for judicial interpretation.²⁷

It is submitted that a change in the law permitting the statutory beneficiaries to maintain the action would not be a radical, unprecedented move. Thirty of the forty-eight states which have enacted wrongful death statutes permit the statutory beneficiaries to maintain the action.²⁸ Such a change would avoid unsound inter-

only. They held merely that the period during which the notice of claim must be filed does not begin to run in wrongful death actions until the appointment of the personal representative. It may be well to note that in all of these cases the action for wrongful death was in fact commenced within two years after the death of the decedent. *Crapo v. City of Syracuse*, 183 N. Y. 395, 76 N. E. 465 (1906); *Hammond v. Incorporated Village of Southampton*, 77 N. Y. S. 2d 156 (Sup. Ct. 1947); *Sweet v. City of Little Falls*, 10 N. Y. S. 2d 90 (Sup. Ct. 1938); *Conway v. City of New York*, 139 App. Div. 446, 124 N. Y. Supp. 660 (1st Dep't 1910); *Barnes v. City of Brooklyn*, 22 App. Div. 520, 48 N. Y. Supp. 36 (2d Dep't 1897). It appears therefore that the *Jones* case was erroneously decided by misinterpreting the holdings in these prior cases.

²³ *United States Fidelity & Guaranty Co. v. Graham & Norton Co.*, 228 App. Div. 45, 239 N. Y. Supp. 134 (3d Dep't 1930); *Davis v. N. Y. C. & H. R. R. R.*, 233 N. Y. 242, 135 N. E. 277 (1922); *Hamilton v. Erie R. R.*, 219 N. Y. 343, 114 N. E. 399 (1916); *Safford v. Drew*, 10 N. Y. Super. Ct. Rep. 630 (1854).

²⁴ *Traveler's Ins. Co. v. Louis Padula Co., Inc.*, 184 App. Div. 791, 170 N. Y. Supp. 869 (1st Dep't 1918).

²⁵ N. Y. DEC. EST. LAW § 133.

²⁶ See note 10 *supra*.

²⁷ *Sutherland v. State*, 189 Misc. 953, 969, 68 N. Y. S. 2d 553, 570 (Ct. Cl. 1947), where the court said: "The right of action for death by wrongful act is vested exclusively in the personal representative of the deceased who may bring the action for the benefit of those named in the statute."

²⁸ *Alabama*, ALA. CODE ANN., tit. 7, § 222 (1940); *Arizona*, ARIZ. CODE ANN. §§ 31-101, 102 (1939); *Arkansas*, ARK. DIG. STAT. §§ 27.903-904, 73.1003 (1947); *California*, CAL. CODE CIV. PROC. ANN. §§ 376, 377 (1946); *Colorado*, COLO. STAT. ANN. Rule 17-b (1935); *Delaware*, DEL. REV. CODE § 4638 (1935); *Florida*, FLA. STAT. § 768.02 (1941); *Georgia*, GA. CODE ANN. §§ 105-1302-3, 1306-7, 66-401 (1909); *Idaho*, IDAHO CODE § 5-219 (1947); *Iowa*, IOWA CODE c. 635, § 9 (1946); *Kansas*, KAN. GEN. STAT. ANN. § 60-3204 (1935); *Kentucky*, KY. REV. STAT. § 411-150 (1946); *Louisiana*, REV. CIV. CODE § 2315 (1870); *Maryland*, MD. ANN. CODE GEN. LAWS Art. 67, 101 (1939); *Massachusetts*, MASS. GEN. LAWS c. 427 (1949); *Mississippi*, MISS. CODE ANN.

pretations of Section 130 of the Decedent Estate Law.²⁹ It would also give the beneficiaries a remedy, where in cases like *Leun v. Brimmer*³⁰ they were left remediless because the administrator had been appointed more than two years after the death of the decedent.

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§ 1453 (1942); Missouri, MO. REV. STAT. ANN. §§ 3652-6 (1945); Montana, MONT. REV. CODE ANN. §§ 9075-6 (1935); Nevada, NEV. COMP. LAWS ANN. §§ 8553, 9194 (1929), NEV. COMP. LAWS ANN. § 9195 (Supp. 1941); New Mexico, N. M. STAT. ANN. c. 125 (1947); North Dakota, N. D. REV. CODE § 32-2103 (1943); Oklahoma, OKLA. STAT. tit. 12, §§ 1053-4 (1941); Oregon, ORE. COMP. LAWS ANN. § 102-1604 (1940); Pennsylvania, PA. STAT. ANN. tit. 12, §§ 1601, 1602 (1936); Rhode Island, R. I. GEN. LAWS c. 477, § 1 (1938); Tennessee, TENN. CODE § 8236 (1932); Texas, TEX. STAT., REV. CIV. ART. 4675 (1948); Utah, UTAH CODE ANN. tit. 104, c. 3, § 10 (1943); Washington, WASH. REV. STAT. ANN. § 184 (1940); Wisconsin, WIS. STAT. c. 331, §§ 3-4 (1949).

²⁹ *Jones v. 416 Pleasant Avenue Holding Corp.*, — Misc. —, 90 N. Y. S. 2d 92 (Sup. Ct. 1949).

³⁰ See note 20 *supra*.